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UNFINISHED HOMEWORK FOR UNIVERSITIES: MAKING THE CASE FOR AFFIRMATIVE ACTION

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INTRODUCTION

Can you remember a time when you woke up in the middle of the night in a cold sweat, realizing that a deadline was looming and feeling that you could not possibly complete the work that was necessary to meet it? Most students (and faculty members, for that matter) in higher education have experienced that sensation at some point in their academic careers. Unfinished homework, along with the consequences that can flow from it, is a source of such nightmares for lawyers as well as educators who are involved in the ongoing fight to defend affirmative action programs in higher education. In this instance, the nightmares are exacerbated by courts that seem to change the assignment and raise the evidentiary hurdles at every turn, and by the increasing pressure from politicians and media pundits who call for an immediate end to all affirmative action programs in which race is taken into account.¹

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1. This Article will focus on affirmative action programs in which race or national origin is taken into account. The Article will focus on such programs due to the fact that they are subject to strict scrutiny under the law. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that strict scrutiny applies to federally sponsored affirmative action programs, just as it does to programs initiated by other entities). Moreover, racial issues have

The unfinished homework in the affirmative action debate concerns the development of an articulated vision—supported by a strong evidentiary basis—of the educational benefits of racial diversity in higher education. The legal groundwork for this homework assignment was laid out by Justice Powell when he declared that diversity can serve as a compelling interest to justify race-conscious affirmative action in his pivotal opinion in the Supreme Court's 1978 *Bakke* decision.² The assignment includes conducting a rigorous analysis of the means that are necessary in order to achieve educational benefits from diversity, keeping in mind the missions of colleges and universities. These institutions have long asserted that diversity serves important educational and public purposes, and society at large seems to agree with this assessment even if there is some disagreement about the best means to achieve this end.³ A wide variety of organizations representing different constituencies in higher education have also recognized the educational benefits of diversity.⁴ Opponents of affirmative action

been the greatest source of legal and political controversy in recent affirmative action litigation in higher education. *See, e.g.*, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *reh'g en banc denied*, 84 F.3d 720, *cert. denied*, 518 U.S. 1033 (1996), *remanded for further proceedings*, 999 F. Supp. 872 (W.D. Tex. 1998) (challenging a University of Texas Law School admissions program involving different tracks for minority and non-minority applicants), *appeal filed*, No. 98-50506 (5th Cir. 1998); *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich. filed Dec. 3, 1997) (challenging the allegedly race-based admissions program at the University of Michigan Law School); *Gratz v. Bollinger*, No. 97-75231 (E.D. Mich. filed Oct. 14, 1997) (challenging allegedly different admissions standards for white and minority applicants at the University of Michigan College of Literature, Sciences, and the Arts); *Smith v. University of Wash. Law School*, Civ. No. C-97-335 (W.D. Wash. filed Mar. 5, 1997) (challenging allegedly different admissions standards for white and minority applicants at the University's law school).

2. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-13 (1978). In his opinion, considered by most experts to be controlling on the issue of diversity as a compelling interest in higher education, Justice Powell states that the attainment of a diverse student body is "a constitutionally permissible goal for higher education," noting that "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Id.* (citation omitted).

3. *See, e.g.*, *Floridians See Many Benefits to Diversity in Higher Education*, DIVERSITY DIGEST (Spring 1998) (discussing statewide polls in Florida and Washington State showing that two-thirds or more of voters believe that colleges should prepare graduates to get along in a diverse society, and that diversity programs can help bring society together).

4. *See, e.g.*, *Brief of amici curiae American Council on Education et al., Board of Educ. of the Township of Piscataway v. Taxman*, 118 S. Ct. 595 (1997) (No. 96-679) (discussing the educational importance of diversity in higher education for all students and signed by many national associations that represent public and independent higher education institutions and

have certainly not disproven the benefits of diversity, nor have they demonstrated that race-conscious affirmative action programs are unnecessary to obtain racial diversity and its concomitant educational benefits in higher education.⁵ Instead, they have relied upon strong and exacting protections against race discrimination in American law to attack programs that have been used by colleges and universities to recruit and retain members of underrepresented racial and ethnic minority groups.⁶

From a legal standpoint, part of the problem is that many institutions established affirmative action programs to serve one compelling interest—to remedy the present effects of past discrimination⁷—and are now seeking to sustain those programs to serve a different compelling interest—achieving the educational benefits of diversity.⁸ However, even if one argues that narrowly defined vestiges of past discrimination have been eliminated at particular institutions,⁹ the diversity rationale remains important as a matter of educational quality for all students. Indeed, an institution with no prior history of discrimination might decide that its student body would reap educational benefits from increased diversity on

educators); Association of American Universities, *On the Importance of Diversity in University Admissions*, N.Y. TIMES, Apr. 24, 1997, at A27 (defending the use of race-based affirmative action in higher education and signed by the presidents of sixty-two major research universities).

5. See, e.g., Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. CR-CL L. REV. 381, 435-36 (Summer 1998) ("Indeed, no empirical research comparable in scope or rigor [to studies that begin to provide a basis for the diversity rationale] supports the claim that racial diversity in the student body frustrates the educational process.").

6. See *supra* note 1.

7. See, e.g., *United States v. Fordice*, 505 U.S. 717 (1992) (holding that a state system of higher education has an affirmative obligation to eliminate the vestiges of past discrimination within the system).

8. The relationship between these two rationales cannot be denied; both relate to the United States' history of discrimination, segregation, and inequality of opportunity based on race.

9. See, e.g., *Hopwood*, 78 F.3d 932 (holding that the University of Texas Law School failed to demonstrate present effects of past discrimination within the Law School sufficient to justify continued consideration of race in admissions program); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) (holding that the University of Maryland had failed to provide sufficient factual support to demonstrate that a race-based scholarship program for African-American students was narrowly tailored to the asserted interest in remedying the present effects of past discrimination at that particular institution).

campus, and its mission statement might even include a statement about the importance of diversity to the learning environment. Such an institution might primarily serve a local area with relatively little racial diversity and might need to make special efforts to recruit beyond that area for the benefit of all of its students.

The need to prove the linkage between diversity and educational quality lies at the heart of today's unfinished legal homework assignment. The legal burden may rest squarely on the shoulders of the proponents of affirmative action to make this case, but the historical burden should arguably fall at least as much upon the shoulders of the opponents of affirmative action programs. In spite of the irony of this burden-shifting, the legal burden imposed on affirmative action programs was never intended by the Supreme Court to be impossible to meet,¹⁰ and much of the work to meet that challenge is already being done in constructive and creative ways. Many organizations and researchers are doing more than paying lip service to the educational benefits of diversity; they are studying it from a variety of angles and testing some time-honored hypotheses and assertions.¹¹ This research is being conducted at the campus level as well as the national level.¹² In a comprehensive survey of current research on diversity, the Association of American Colleges and Universities reports the following points among its findings:

Overall, the literature suggests that diversity initiatives positively affect both minority and majority students on campus. Significantly, diversity initiatives have an impact not only on student attitudes and feelings toward intergroup relations on campus, but also on institutional satisfaction, involvement, and academic growth.

...

Opportunities for interaction between and among student

10. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (attempting to dispel the notion that strict scrutiny is not "strict in theory, but fatal in fact").

11. For overviews of research on diversity in higher education, see DARYL G. SMITH & ASSOCIATES, *DIVERSITY WORKS: THE EMERGING PICTURE OF HOW STUDENTS BENEFIT* (1997); CARYN MCTIGHE MUSIL WITH MILDRED GARCIA, YOLANDA T. MOSES, & DARYL G. SMITH, *DIVERSITY IN HIGHER EDUCATION: A WORK IN PROGRESS* (1995).

12. See *supra* note 11.

groups are desired by virtually all students and produce clear increases in understanding and decreases in prejudicial attitudes. Such opportunities also positively affect academic success. The conditions under which interactions among individuals are likely to be beneficial include institutional support, equal status, and common goals.

...

Recent research on the significance of the institutional commitment to diversity suggests that the perception of a broad campus commitment to diversity is related to increased recruitment and retention of students from underrepresented groups.

This perception of a broad campus commitment to diversity is also related to positive educational outcomes for *all* students, individual satisfaction, and a commitment to improving racial understanding.¹³

As reflected in these research efforts to assess the educational impact of diversity, lawyers and educators alike are beginning to wrestle concretely and constructively with some of the truly difficult legal, political, moral, and philosophical questions raised by the affirmative action debate. As the research continues, the link between educational quality and legal standards must be explored and articulated in a manner that courts will understand and accept if race-conscious affirmative action programs are to survive.¹⁴ In significant legal cases involving affirmative action programs, the courts have thus far largely failed to acknowledge such research or rely upon it to demonstrate that racial diversity is a compelling interest in education.¹⁵ Publishing, disseminating, and translating into legally

13. SMITH & ASSOCIATES, *supra* note 11.

14. See Liu, *supra* note 5 (discussing the need for educational policy arguments in favor of diversity to be tied to legal standards applicable to programs in which race is taken into account).

15. The Supreme Court was presented with an opportunity to review briefs discussing the research and evidence about the educational benefits of diversity in the context of a recent affirmative action case involving teacher employment, but the case was settled prior to oral argument and, thus, was removed from the Court's jurisdiction. See Brief of amici curiae American Council on Educ. et al., Board of Educ. of the Township of Piscataway v. Taxman, 118 S. Ct. 595 (1997) (No. 96-679).

cognizable terms these research efforts are critical components of the homework assignment on diversity. These aspects of the assignment require the cooperation of scholars and lawyers.

In today's legal climate, many lawyers question whether colleges and universities should even bother attempting to defend race-conscious affirmative action in light of the high legal hurdles imposed by courts in recent cases. In most cases, the diversity rationale remains the best and perhaps the only option upon which to base affirmative action programs.¹⁶ It can also be the most politically palatable defense for the following reasons: (1) it is future-oriented (focusing on the preparation of students for participation in a diverse society) rather than backward-looking (as are arguments about vestiges of prior discrimination); (2) it does not require an admission of guilt (as do discrimination rationales), but rather a positive statement of educational mission; and (3) it can arguably provide benefits for all students, rather than only for members of particular racial or ethnic groups.¹⁷

If diversity is to survive as a legal basis for affirmative action in higher education, data must be collected and analyzed in ways that respond directly to the legal standards applicable to affirmative action programs under the strict scrutiny standard. Broad platitudes about the value of diversity must be backed up with concrete, systematic, articulated evidence to respond to questions such as the following: What are the demonstrable educational benefits of racial and ethnic diversity in higher education? What types of policies or programs best provide those benefits? How can those policies and programs be limited in order to comply with the requirements of the strict scrutiny

16. See *Nondiscrimination in Federally Assisted Programs*; Title VI of the Civil Rights Act of 1964; Notice of final policy guidance; 59 Fed. Reg. 8756 n.1 (Feb. 23, 1994) (stating that the Department of Education would consider bases other than remedying discrimination or diversity on a case-by-case basis as support for the consideration of race or national origin in awarding financial aid). The courts have not recognized other justifications for the consideration of race in higher education cases to date.

17. The relative benefits and burdens of affirmative action programs are an important component of the legal analysis. See, e.g., *United States v. Paradise*, 480 U.S. 149, 171 (1987) (stating that the burden on those who are excluded from the benefit of an affirmative action program must be considered as part of the "narrow tailoring" analysis). A program that is designed to benefit all students, rather than members of a particular racial group, may, thus, be less susceptible to legal challenge with regard to this aspect of the analysis.

analysis applicable to race-based affirmative action programs? These are among the key questions that need to be asked and answered—the unfinished homework of the affirmative action debate.

I. EVIDENCE REGARDING THE EDUCATIONAL BENEFITS OF DIVERSITY

In making the case for diversity, among the most fundamental issues that must be explored are whether, to what extent, and for whom racial and ethnic diversity among faculty¹⁸ and students provides educational benefits that cannot be achieved through other means. These questions have already served as a springboard for extensive and varied research projects looking at the perspectives of both students and educators.¹⁹

A. Educational Benefits: The Student Perspective

Many supporters of affirmative action have consciously and expressly moved away from group-based assumptions and stereotypes that might have appeared to underlie their advocacy of affirmative action. Affirmative action supporters have made such a move largely because courts have frowned upon affirmative action justifications that deny individuality and are premised upon race as a proxy for a particular point of view.²⁰ As a result, affirmative action proponents now widely premise their support for racial diversity in education upon a set of assumptions that views each student as a unique individual.²¹ In a decision that was subsequently overturned by the First Circuit in a recent opinion, a federal district court acknowledged this perspective on the educational benefits of racial diversity in a secondary school setting:

18. This Article will focus on student body diversity. For a discussion of the contribution of faculty diversity to the educational environment, see Jonathan R. Alger, *When Color-Blind is Color-Bland: Ensuring Faculty Diversity in Higher Education*, 10 STAN. L. & POL. REV. (forthcoming Winter 1998).

19. See *supra* note 11.

20. See, e.g., *Bakke*, 438 U.S. at 2758-59.

21. See, e.g., Jonathan R. Alger, *The Educational Value of Diversity*, 83 ACADEME 20, 21 (Jan./Feb. 1998) (“The range of similarities and differences within and among racial groups is precisely what gives diversity in higher education its educational value.”).

Of great significance is the fact that diversity in the classroom is the most effective of all weapons in challenging stereotypical preconceptions. When studying side by side, in a diverse setting, students grow to understand and respect the differences among them as they share life in a complex, pluralistic society. And, as important, they learn that most people, regardless of their backgrounds, think in fundamentally the same [way] about matters of character, team work, and mutual respect.²²

This argument applies with equal force in higher education, a critical juncture in the life of students who may have grown up in largely segregated local school systems and who are about to graduate into a global marketplace with a workforce mirroring the diversity on that globe.

Evidence is emerging which indicates that the existence of diverse populations of students on college campuses is beneficial to both majority and minority students.²³ The pioneering work of Alexander Astin and others has begun to demonstrate that an institutional emphasis on diversity has positive effects on, among other things, students' cultural awareness and personal commitment to racial understanding.²⁴ A 1996 study of 300 campuses found that racially-mixed student populations have positive effects on retention, overall college satisfaction, college grade-point averages, and intellectual and social self-confidence.²⁵ Moreover, students themselves

22. *Wessman v. Boston Sch. Comm.*, 996 F. Supp. 120, 128 (D. Mass.) (holding that a school committee has a compelling government interest in adopting a race-conscious selection policy for Boston Latin School in order to maintain racial diversity), *rev'd*, No. 98-1657 (1st Cir. 1998). The First Circuit held that the particular admissions system used by the Boston School Committee relied too heavily on specific numerical percentages, creating a system of proportional representation that was not demonstrably linked to particular educational benefits. *See id.* Nevertheless, the First Circuit acknowledged that diversity could constitute a compelling interest under certain circumstances and explicitly refused to hold that Justice Powell's opinion in *Bakke* is no longer good law. *See id.*; *see also* *Hunter v. Regents of Univ. of Cal.*, 971 F. Supp. 1316, 1324-30 (C.D. Cal. 1997) (opining that a university has a compelling interest in achieving an ethnically diverse student body in a laboratory elementary school).

23. *See, e.g.*, ALEXANDER W. ASTIN, *WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED* (1993) (assessing the intellectual and social development of satisfaction with the college experience of over 20,000 students at 200 colleges and universities nationwide).

24. *See id.*

25. *See* Mitchell J. Chang, *Racial Diversity in Higher Education: Does a Racially Mixed*

increasingly recognize the importance of diversity in their own education.²⁶

How and why does diversity make a difference to students in the learning process? In order to establish racial diversity as a compelling interest, and justify affirmative action programs which further that interest, the nature of students' educational interactions must be closely examined. Much of the affirmative action litigation has focused on affirmative action programs aimed at the point of entry into the system of higher education, such as admissions and financial aid programs.²⁷ If an institution focuses the bulk of its attention on admissions and financial aid, however, it runs the risk of failing to create the type of environment in which the diversity it seeks can have its greatest educational impact on campus.

In order to complete the educational-legal link behind such programs, it would help to understand the extent to which different types of classroom situations, teaching techniques, and social interactions contribute to individual learning by breaking down stereotypes. Where do the most significant interactions for the breaking down of racial stereotypes take place?²⁸ This is the type of question that must be explored as colleges and universities examine their policies with regard to issues such as class size, extracurricular activities, cultural centers, and dormitory and dining hall arrangements.²⁹

B. Educational Benefits: The Faculty Perspective

Along with evidence from the students' own perspective, evidence about the learning process from the perspective of the front-line

Student Population Affect Educational Outcomes? (1996) (unpublished Ph.D. dissertation, University of California (Los Angeles)) (on file with author).

26. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 218-55 (1998) (discussing the increasing recognition of the importance of diversity by college graduates).

27. See, e.g., *Hopwood*, 78 F.3d 932 (admissions challenge); *Podberesky*, 38 F.3d 147 (financial aid lawsuit).

28. See, e.g., *Bakke*, 438 U.S. at 2760 n.48 (quoting speculation by the president of Princeton University about how and when "learning through diversity" actually occurs).

29. See Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 *UCLA L. REV.* 1745, 1778 (1996) (discussing the need for institutions with diversity programs to encourage interactions that help people learn from one another).

educators—*i.e.*, the faculty—is critical to establishing the educational argument for the value of diversity on campus. In his opinion in the *Bakke* case, Justice Powell discusses the importance of “academic freedom” for universities to decide how “to select those students who will contribute the most to the ‘robust exchange of ideas’” on campus.³⁰ Accordingly, in making decisions about how best to educate students in particular disciplines, the courts may be most likely to respect the testimony of faculty members with professional expertise in those disciplines.³¹

Anecdotal evidence from individual faculty members about the educational benefits of diversity in their own classrooms is easy to find, but a systematic review of educators’ perspectives on diversity is one of the missing links in the evidentiary chain. Accordingly, the American Association of University Professors and American Council on Education, along with a national research consortium, are studying the impact of racial diversity in the classroom from the perspective of faculty members.³² This type of research attempts to get beyond mere anecdotes and platitudes by exploring the impact of racial diversity in the classroom on specific aspects of the educational process, such as the development of critical thinking and the depth and breadth of perspectives and questions raised in class. Faculty members’ observations and assessments on these issues should carry considerable weight in light of their direct experience and role as educators.

This type of research indirectly raises another set of fundamental issues in the affirmative action debate—the definition(s) of merit that should be applied to students in the admissions process. If broad definitions of education and preparation for participation in the working world and society in general are central to the mission of

30. *Bakke*, 438 U.S. at 2760.

31. See, e.g., *Affirmative Action Plans: Recommended Procedures for Increasing the Number of Minority Persons and Women on College and University Faculties* (1983), AAUP POLICY DOCUMENTS & REPORTS 163, 166 (1995 ed.) (“primary responsibility for affirmative action should reside within the academic community and especially with the faculty”); Liu, *supra* note 5, at 431 (noting that professors and administrators are uniquely positioned to evaluate the educational benefits of diversity).

32. A faculty survey instrument has been designed with specific questions about the impact of more and less diverse classes on teaching, learning, and research. The survey was mailed to a random sample of faculty members across the country in the fall of 1998.

colleges and universities, then the contributions that are made to that mission by individuals should arguably be considered as part of the merit equation.³³ This broad, community-based view of institutional mission and the learning environment cries out for consideration of factors other than test scores and grade-point averages.³⁴ Reexamination of the concept of merit in education is one of the most useful byproducts of the affirmative action discussion, and should yield educational benefits regardless of how the case law on affirmative action turns out.

C. Educational Benefits: The Societal Perspective

If preparation for participation in the working world and in the civic life of society is indeed a vital part of the educational mission of colleges and universities, then the experiences and perspectives of leaders in business and other segments of society should also be taken into account in the overall evidentiary framework of diversity. In a landmark study of the experiences of race-sensitive admissions policies on students of different races, the former presidents of Princeton and Harvard note that both white and black students who graduate from selective schools tend to be involved in community activities and argue that civic spirit "is surely one important indicator of 'merit.'"³⁵

Colleges and universities must take great care in the extent to which they rely on such information, however, because, under the law, they cannot use their own affirmative action programs to remedy societal discrimination or otherwise to make up for the failures of

33. See, e.g., BOWEN & BOK, *supra* note 26, at 278 ("In our view, race is relevant in determining which candidates 'merit' admission because taking account of race helps institutions achieve three objectives central to their mission—identifying individuals of high potential, permitting students to benefit educationally from diversity on campus, and addressing long-term societal needs.").

34. See, e.g., Arthur L. Coleman, "Live by the Score, Die by the Score:" *Academic Freedom and Responsibility in Admissions Decisions*, DIVERSITY DIGEST 6 (Summer 1998) ("Given widely held, and often erroneous, perceptions that test scores or grades alone define merit in the context of college admissions, higher education leaders need to do a better job not only of assessing and defining holistically the definition of merit and value among student applicants, but also of communicating the substance of these decisions.").

35. BOWEN & BOK, *supra* note 26, at 192.

other institutions.³⁶ They can, however, look carefully at the partnerships that they have with entities beyond the campus and examine the geographical and disciplinary areas served by their graduates. If service to these specific constituencies is articulated as part of a single institution's educational mission, then that institution could be on stronger ground in considering feedback from these other entities when fashioning its own affirmative action programs.

D. Educational Benefits: The Perspective of Different Disciplines

The scant case law dealing with educational diversity and the majority of the surveys and other forms of basic research completed to date discuss the educational benefits of diversity in general terms, without reference to particular disciplines. Opponents of affirmative action might argue that even if diversity adds value to highly interactive courses in discrete subjects directly related to race (*e.g.*, ethnic studies classes), it is essentially irrelevant in courses in many fields in which race is not a central issue (*e.g.*, mathematics or physics) and in less interactive classes of all sorts. The extent to which the educational benefits of diversity vary with subject matter and other classroom characteristics is one of the more subtle but important questions in the affirmative action debate.

The answer to this question could have implications for the locus of affirmative action efforts. For example, if research were to demonstrate that diversity has a significant impact on educational experiences in social science and humanities classes, but little impact on educational experiences in the hard sciences, should diversity-based affirmative action programs be limited somehow to those departments that can demonstrate measurable benefits? It might be relatively easy for a university to make such distinctions with regard to programs in different types of graduate schools (*e.g.*, differentiating among a law school, medical school, business school, and graduate physics department). The issue becomes considerably more complicated, however, when thinking about its implications for

36. See, *e.g.*, *Hopwood*, 78 F.3d 932 (opining that a state university law school cannot base its affirmative action program in admissions upon discrimination in other parts of the state university system or elementary and secondary schools).

undergraduate liberal arts education in which students enter the institution without announcing their academic majors and are expected and encouraged to take courses outside of their eventual chosen field of study.³⁷ In how many departments must an undergraduate institution demonstrate the existence of tangible educational benefits in order to sustain a race-conscious affirmative action program in the undergraduate admissions process? What about evidence of diversity-related educational interactions outside of the classroom? If overcoming assumptions and breaking down stereotypes are among the keys to the importance of diversity, then these factors may come into play in fields in which race is never even mentioned as an issue. These are not easy questions to answer, but they need to be asked by undergraduate institutions offering a broad array of subject matter.

Another possibility is that diversity might be demonstrated to have the greatest educational impact in certain types of pedagogical settings.³⁸ Different faculty members may employ a wide variety of classroom teaching styles, texts, and examples to teach the same subject matter. Class size, the presence or absence of group assignments or teamwork, and other variables can also affect the quantity and quality of interaction in the classroom.³⁹ In addition to conducting or participating in research on these issues, institutions can encourage communication among faculty members to raise their awareness of the impact of their pedagogical choices on diverse student bodies.

37. See generally Liu, *supra* note 5, at 431. Liu notes:

For example, an undergraduate liberal arts college could more easily demonstrate an educational need for racial diversity than a graduate school in earth science. Yet a physics department offering undergraduate research scholarships would face more difficulty in justifying diversity-based affirmative action than the undergraduate college as a whole. And a medical school or law school could more persuasively state its interest in educational diversity than the earth science graduate school.

Id. (Citations omitted).

38. See, e.g., *In Law Schools, Diverse Classrooms Encourage Diverse Participation, Study Finds*, Chron. of Higher Educ./Academe Today (Jul. 6, 1998) (discussing the impact of various degrees of classroom diversity on discussions in law school classes where the Socratic method and other pedagogic techniques were used).

39. These are among the issues explored in the faculty survey instrument discussed in note 32 above.

II. DEFINING THE BOUNDARIES OF AFFIRMATIVE ACTION PROGRAMS

Even if diversity is demonstrated to be a compelling interest in higher education, the next step is to identify the types of programs and policies that will best achieve the educational benefits associated with diversity and the degree to which consideration of race is necessary in order to produce those benefits. These analytical steps are required under the “narrow tailoring” requirement for race-conscious affirmative action programs.⁴⁰ Even if race-neutral means are shown to be insufficient to achieve racial diversity, the manner in which race is defined and used must be carefully considered.⁴¹ Institutions must pay as much attention to the narrow tailoring of affirmative action programs as they do to the establishment of a compelling interest.

A. Defining Racial Classifications

In an admissions program in which race is taken into account, care must be taken to avoid the reality or even the appearance of rigid quotas for members from various racial and ethnic groups.⁴² Many institutions use the demographics of their service area as a guide, usually by focusing upon the eligible pool of high school graduates within that area. But the notion of a defined service area may be problematic for selective institutions that draw students from all over the country and the world.

In setting numerical goals, the definitions of “race” and “national origin” and the identification of racial and ethnic groups for affirmative action purposes are not as obvious as first meets the eye.

40. For a thorough discussion of narrow tailoring as part of the strict scrutiny review of affirmative action programs, see *United States v. Paradise*, 480 U.S. 149 (1987); see also 59 Fed. Reg. 8756-57 (describing the narrow tailoring analysis as applied to race-targeted financial aid programs).

41. The types of race-neutral alternatives to race-conscious affirmative action have been the subject of much recent debate. See, e.g., RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) (arguing for class-based affirmative action); but cf., e.g., Deborah Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996) (pointing out the limitations of class-based affirmative action and other alternatives to the use of race in achieving diversity in law school admissions).

42. See, e.g., *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (discussing the dangers of numerical targets that induce preferences based on race).

The broad categories used for years by many institutions (*e.g.*, white, African-American, Hispanic, Asian or Pacific Islander, Native American) may or may not be relevant and helpful at a specific institution, depending upon its location and applicant pool. At some California universities, for example, it may make sense to distinguish among various Asian-American populations with different histories and social circumstances (*e.g.*, Chinese-Americans, Japanese-Americans, Filipino-Americans, Vietnamese-Americans, and Laotian-Americans, to name just a few). Some of these groups may be underrepresented and face significant obstacles that differ substantially from other Asian-American groups.⁴³

This type of subdivision of broad racial groups has long been practiced in the financial aid arena, for example, in the provision of scholarships for students with specific types of backgrounds. Private donors might choose to limit scholarships to a particular European-American group (*e.g.*, individuals of Italian-American or Polish-American ancestry). Leaving aside the question of whether such specific diversity is necessary to produce educational benefits in the higher education setting, at the very least it is usually relatively easy for most white Americans to identify basic information about their family origin in this manner. As part of the application process, a student might even write a compelling personal essay about his or her grandparents who arrived at Ellis Island or some similar gateway to America. For African-Americans, however, such detailed subdivision based on national origin is often virtually impossible.⁴⁴ Thus, fine-tuning of national origin requirements in an affirmative action program may disadvantage African-Americans in particular, and colleges and universities must wrestle with the question of the extent to which such fine-tuning is demonstrably necessary to the provision of educational benefits.

43. See, *e.g.*, T. Alexander Aleinikoff, *A New Sort of Multiracial America*, WASH. POST, Sept. 18, 1998, at A29 (discussing the varying social and economic circumstances and experiences of Asian-American immigrants from different countries).

44. If a student's ancestors were brought to the United States as slaves, for example, specific information about their geographic origin may be extremely difficult to obtain. Moreover, the African continent was not even subdivided into nations as defined by Western cultural standards at the time when many ancestors of African-Americans were brought to the United States.

Furthermore, colleges and universities must increasingly face the question of how to deal with questions of mixed ancestry.⁴⁵ As society becomes more diverse and intermarriage becomes more common, some students might be able to trace their roots to virtually every major racial group. These types of demographic changes require regular reassessment of affirmative action programs to ensure that they are responsive to changing circumstances.⁴⁶ This is a difficult issue that requires careful thought in a “melting pot” society, for it represents exactly the type of conundrum that is used by some opponents of affirmative action to ridicule the entire concept of consideration of race and to call for a “color-blind” approach to admissions.

What if a college or university states that part of its mission is to expose its students to representatives from other cultures? To what extent are the benefits produced by international diversity the same as the benefits resulting from domestic racial diversity? Under the civil rights laws, classifications based on “citizenship” rather than race or national origin do not trigger strict scrutiny.⁴⁷

The question of international versus domestic diversity has become a source of contention with regard to both student body and faculty diversity on some campuses. For example, in a recent affirmative action case involving the University of Nevada-Reno, a university’s diversity-based plan for faculty hiring was upheld by the Nevada Supreme Court as applied to the hiring of a black male from Uganda in the sociology department.⁴⁸ A white female applicant for the position filed suit, and the court held that the goal of a racially

45. For example, how should a student be treated for affirmative action purposes when he or she has one white and one black parent (e.g., in a situation where blacks are underrepresented on campus but whites are not)? Most institutions have relied on self-identification by individuals to avoid making such judgments.

46. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 594 (1990) (discussing the need for the periodic reexamination of racial classifications to determine whether there is a continued need for their use).

47. See generally 34 C.F.R. pt. 100 (1997). Note also that classifications based on “political” rather than racial distinctions are not subject to strict scrutiny. See, e.g., 59 Fed. Reg. at 8758 n.5 (recognizing distinction between affirmative action for Native Americans in general and the authority of tribal governments or tribally controlled colleges to provide affirmative action for members of federally recognized tribes).

48. See *Farmer v. University and Community College System of Nevada*, 930 P.2d 730 (Nev. S. Ct. 1997), cert. denied, 118 S. Ct. 1186 (1998).

diverse faculty was analogous to the goal of a diverse student body recognized by the Supreme Court in the *Bakke* decision.⁴⁹ Individuals who have lived in other countries no doubt bring helpful perspectives that contribute to the learning environment on campus, but their contributions may be qualitatively different from the contributions made by minority individuals who were born and raised in the United States. Both types of diversity may be important, but neither one may be an adequate substitute for the other.

In setting goals for affirmative action programs, therefore, this distinction is yet another issue to which colleges and universities will want to give careful consideration in light of the educational benefits for which their programs are designed.

B. Defining Numerical Goals: The Concept of a "Critical Mass"

Another source of controversy in affirmative action programs is the question of critical mass: what number or percentage of students from a particular racial or ethnic group is necessary in order to achieve the educational benefits of diversity? The answer may depend in part upon the nature of the educational benefits produced by such diversity. For example, if there is only one African-American student in a large lecture class of one hundred or more students, is the presence of that single individual sufficient to dispel stereotypes, or might it reinforce them? To what extent does the answer depend upon the participation, perspectives, and performance of that particular student, or upon the ability of other students to interact with him or her on a personal level? Is the presence of members of different underrepresented minority groups mutually reinforcing in this regard, or should institutions focus carefully on the percentage of students in each specific racial or ethnic group in order to maximize the educational benefits of diversity?

The concept of a critical mass in this context defies simple definition and leads inevitably to imbalances in representation of racial and ethnic groups. If a particular group is "overrepresented" in a student body vis-à-vis its percentage of the eligible applicant pool in order to achieve educational benefits, then some other group or

49. *See id.*

groups must by definition be underrepresented. More research needs to be done on the critical mass concept, but one thing is clear: the legal prohibition against quotas in most circumstances means that colleges and universities need to maintain a certain degree of flexibility in their programs and not fall into the trap of becoming obsessed with specific numbers of representatives from various racial groups.⁵⁰

C. Defining the Time Limits

One other aspect of diversity programs that defies simple definition is the endpoint.⁵¹ Under the law, affirmative action programs are subject to periodic reevaluation to determine whether they remain necessary in order to achieve their stated purpose.⁵² If diversity goals remained constant from year to year, then the endpoint would seem simple enough to identify: race-conscious efforts should cease as soon as the goals of the program were reached for various underrepresented groups. But many institutions might argue that they need to maintain affirmative action programs in order to maintain their level of diversity, and that any perceived retreat from this commitment might be perceived as a hostile signal that would discourage minority student applicants. Proponents of affirmative action have yet to define a stopping point for diversity-based programs with any sort of precision,⁵³ but in the meantime the requirement for periodic reevaluation will force institutions to ask this question on a regular basis.

50. See *supra* note 42; see also *Wessman v. Gittens*, ___ F.3d ___, No. 98-1657 (1st Cir. 1998) (criticizing Boston School Committee's use of percentages for various racial groups as an attempt to achieve racial balancing, rather than particular educational benefits backed up with evidence).

51. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion) (stating that race-based programs for the sake of diversity have "no logical stopping point").

52. See *Metro Broadcasting*, 497 U.S. at 594.

53. Note, for example, the broad definition of a stopping point offered by Goodwin Liu, "Diversity-based affirmative action *does* have a logical stopping point: racial preferences work themselves out of existence when the educational and social benefits of diversity have so permeated our society that institutions of higher education no longer need to adopt a self-conscious goal of improving racial understanding." Liu, *supra* note 5, at 427 (citation omitted).

CONCLUSION

The answers to the questions raised above cannot be found in statutes or case law. In fact, they are not strictly legal questions, because they pertain to the nature and quality of the educational experience offered by colleges and universities. Simple abstract pronouncements about “color-blindness” and “equality before the law” are of little use in facing the difficult educational issues raised by these questions.

Attacks on existing affirmative action programs may succeed in temporarily submerging these issues from the legal realm, but they will not erase the underlying strains on our educational system created by an increasingly diverse society. It is always easier to criticize attempts to study, measure, and understand human interaction than it is to come up with constructive ideas and solutions to address hard problems. By attempting to answer some of the hard questions discussed above, proponents of affirmative action can help to develop standards by which to measure affirmative action programs and their effectiveness.⁵⁴

Affirmative action programs that take race into account cannot singlehandedly address the myriad social challenges posed by a diverse society. At best, they can serve as an integral part of much larger and more systematic efforts to ensure equal opportunity throughout the American educational system.⁵⁵ In order to be successful, these efforts must include an array of economic and social initiatives, and they must be both national and local in scale.

The homework assignment to examine the hard questions about affirmative action has not yet been completed, and everyone involved in the debate bears the burden of finishing it. If our society is to make the best possible use of its human resources in order to flourish and

54. See, e.g., Robert S. Whitman, *Affirmative Action on Campus: The Legal and Practical Challenges*, 24 J. COLL. & UNIV. L. 637 (Spring 1998) (“[O]pponents tend to view affirmative action as little more than a euphemism for quotas and reverse discrimination, and they decry the goal of “diversity”—one of the most enduring rationales for affirmative action—as standardless and un compelling.”).

55. See generally SOUTHERN EDUCATION FOUNDATION, *MILES TO GO: A REPORT ON BLACK STUDENTS AND SECONDARY EDUCATION IN THE SOUTH* (1998) (discussing the need for comprehensive educational and social strategies to overcome persisting inequalities of opportunity based on race).

prosper in the next millennium, then it must figure out how to use those precious resources as fully, efficiently, and effectively as possible. It may very well be the case that the whole of the diverse population is far greater than the sum of its individual component parts, but such greatness will be realized only if the educational system allows for an interaction among all of the parts sufficient to enable each one to learn from the others.